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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| WILLIAM ROBERT ABBOT,<br><br>Plaintiff;<br>v.<br><br>KATHLEEN KITTS,<br><br>Defendant and Respondent;<br><br>J. MICHAEL KELLY,<br><br>Objector and Appellant. | B200824<br><br>(Los Angeles County<br>Super. Ct. No. BC363863) |

APPEAL from orders of the Superior Court of Los Angeles County. Charles Lee, Judge. Affirmed.

Law Offices of J. Michael Kelly; J. Michael Kelly and Linda T. Barney for Objector and Appellant.

Law Offices of Burton Mark Senkfor and Burton Mark Senkfor for Defendant and Respondent.

A very unusual surrogacy arrangement is the origin of this very plain discovery dispute. Only the short version of the background saga need be recited here, and it is as follows: Plaintiff William Abbot (Abbot) agreed with defendant Kathleen Kitts (Kitts) that Kitts would bear Abbot's child through in vitro fertilization. A son was conceived and born of this mother in July 2004. Abbot acknowledged in writing his paternity of the child.

Very little went well thereafter. The son encountered significant medical problems. The parents squabbled about the support payments which Abbot had promised in the parties' contract. (That contract provided that Kitts would have sole legal custody and primary physical custody of their child.) They argued about Kitts' life style, about Abbot's visitation with the child, and about paternity. They sued each other.

*Kitts's suit.* Kitts filed a family law proceeding seeking child support. On October 30, 2006, Abbot was ordered to pay $12,500 in child support. On December 6, 2006, Abbot was ordered to pay $50,000 in attorneys' fees. He did neither. His attorney in that action, appellant J. Michael Kelly (Kelly), served discovery requests there upon Kitts, who, in response, on January 5, 2007 filed a motion for a protective order. She contended that she should not be required to respond to any discovery from Abbot as long as the latter was in default of his court-ordered obligations for support and fees. On February 21, 2007, the family law court court granted that motion. Abbot has still not paid either amount. The record reflects no evidence of any attempt to enforce these orders through collection efforts; any such effort may be rendered cumbersome by the fact that Abbot has resided in England throughout these activities. In any event, the protective order remains in effect.

*Abbot's suit.* Through Attorney Kelly, Abbot initiated the present action on December 22, 2006. His most recent pleading is a first amended complaint filed April 26, 2007 listing eighteen causes of action generally expressing Abbot's displeasure with the way in which Kitts and her mother (also a defendant) have sought money from Abbot

and have spent the money they received from him. On January 22, 2007, Kelly served the discovery that is the subject of the present appeal. It consisted of 22 requests for admissions, demands for the production of 44 categories of documents, a Notice of Deposition with a request for the production of 24 categories of documents at that deposition, and 54 form interrogatories. Kitts appeared for her deposition, which extended over four days. She supplied some affirmative responses to other portions of this discovery, but the substantial majority of the requests or questions elicited nothing but multiple objections. There followed the motions and sanctions that are the subject of this appeal and which will be discussed further below. On June 11, 2007, the trial court sustained Kitts's demurrer to the entirety of Abbot's first amended complaint, with some leave to amend. The pleading was never amended, and on October 2, 2007, the action against Kitts was dismissed with prejudice and judgment entered in her favor and against Abbot. That judgment is now final.

## DISCOVERY DISPUTES

A. Plaintiff's Motions

Kelly moved for further responses to each of the four discovery packages he had served upon Kitts. Each of those motions was denied in its entirety, and monetary sanctions were imposed jointly and severally against Kelly and Abbot. The amounts were $1,000 in regard to the interrogatories, $1,000 in regard to the admissions, $2,000 in regard to the document demand, and $1,000 in regard to the deposition production. Only Kelly has appealed, challenging the imposition of sanctions.

Kitts's objections to this discovery covered many of the usual areas (irrelevant, burdensome, overbroad, oppressive, and invasive of privacy), but the parties and the trial court have all devoted substantial energy to one unusual issue: the effect of the ban which the family law court placed upon discovery by Abbot. Defendant here would have all of this discovery barred by virtue of the prior protective order. Kitts's counsel was

particularly exercised about the fact that the Kelly/Abbot demand for the production of documents in the present case repeated the same list of demands that had been the subject of the family law discovery that was embargoed. Kitts's counsel notes that he filed the motion for that order on January 5, 2007, that this discovery was served fifteen days later, and that the family law court issued its order February 21, 2007, which was before any responses were due to any of the discovery demands in this case.

The trial court identified the family law protective order as a principal reason for its denial of these four motions. Reference was also made to the case of *Glade v. Glade* (1995) 38 Cal.App.4th 1441 (*Glade*), where the appellate court emphasized the nature of the Superior Court as one unit, with the orders of one department thereof effective in every other department, regardless of the nature of any department's special assignment. In their briefs, the parties have analyzed the *Glade* case at length. They have debated about whether or not it is meaningful that these parties' family law case was never consolidated with this case or denominated a related case. They have compared the issues in these two cases.

The parties pay scant attention to the merits of the disputed discovery. In fact, the appellant never addresses this topic in either of his briefs. The respondent makes only fleeing reference thereto, but invites the court's attention to her four written opposition arguments filed in response to the underlying motions. The trial court expressed its concern that any discussion of the merits of the discovery requests might be seen as ignoring or overlooking the family law order, which the trial court concluded must be honored.

The issues that were murkily tendered in the two complaints attempted by the plaintiff herein appear to extend beyond the limits of the family law case. It is by no means clear, but it appears that the plaintiff was here proposing to recoup support payments he had made to the defendant and to gain title to various assets allegedly purchased by the defendants with funds from the plaintiff. Because those issues may not have arisen in the

family law case and their resolution would not interfere with decisions about custody, visitation, or support, Abbot has urged the inapplicability of the *Glade* case. In opposition, Kitts particularly cites (1) the identical nature of the two sets of document demands and (2) her willingness to appear for her deposition and to answer some of the written discovery as reasons why the protective order should be enforced here.

We have concluded that there is no need to pursue on a broad scale the issue of the protective order or analysis of the *Glade* opinion. The scope of the protective order should not be a recurring issue in any other case, because the dismissal of the present action with prejudice means that Abbot will have no future opportunity to seek any discovery here or in any similar case. In addition, there are multiple other compelling reasons justifying the orders issued by the trial court.

"No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." *Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329. We do not here conclude that the trial court's reasoning was wrong, but we choose to emphasize the many other flaws in the plaintiff's discovery and subsequent motions. These amply justified the sanctions that were imposed.

Among the plaintiff's discovery efforts were requests that the defendant admit that she had been employed as a topless dancer, that she appeared as an actress in a motion picture, and that she advertised herself "on the Internet Web in bikini pictures." She was asked to produce "all documents pertaining to" all of her recent tax returns, any monies she has received from any inheritance or any living trust, and "any and all school records, transcripts, grade reports, certificates, degrees, or other records relating to education, both past and present." Abbot demanded that Kitts bring a similar assortment of documents to her deposition.

Not surprisingly, Kitts interposed numerous objections to most of this discovery. These objections extended far beyond her concern about the family law court's protective order. Abbot's responses were by no means models of precision or specificity. They were, in fact, a mindless repetition of a litany of assorted objections, even including some that might occasionally apply to the question or demand under discussion. Unfortunately, this squabble deteriorated from there. The plaintiff's four motions seeking enforcement of his discovery demands have invoked nearly everything that can go wrong in such motions.

*Requests for Admissions.* Of 22 original requests, Kitts admitted four and objected to 18. Kitts's subsequent motion then repeated verbatim the same argument in support of each of the 18 disputed requests. Nowhere in this canned "analysis" is there single word mentioning any of the requests or explaining why any of them is relevant or why they are not invasive of the defendant's privacy or why the request is not too broad or anything else. This "analysis" could have had - and very possibly did have - its origin in another lawsuit far away and long ago. The plaintiff tendered not a word justifying proposed discovery about the defendant's movie career or her employment history or anything else. Such a defective motion could only be denied, with sanctions imposed.

*Document Demands.* It gets no better. All 44 of the plaintiff's demands were met with objections. Again, unfortunately, the plaintiff's supporting declaration under California Rules of Court, rule 3.1020 made no effort to discuss *these demands* or *this lawsuit.* The same rote paragraph was repeated 44 times, with not a single word of "analysis" about why the defendant should produce receipts for her haircuts or copies of her tax returns or her portfolio of municipal bonds or anything else. The problem is aggravated here by the absence of a whisper of a showing of good cause for the production of any document. Code of Civil Procedure section 2031.310(b)(1) makes this an essential element of any such motion. The Appellant's supporting declaration accompanying this motion asserted that the requested information was "vital as to the

causes of action in the Complaint" and "vital to the issues of this case," but that is far from the "fact specific" showing of relevance that is required. (See *Kirkland v. Superior Court* (2002) 95 Cal App.4th 92, 98.) The moving party should make a particularized showing of justification for the production of each of these 44 categories of documents. Plaintiff did not do so. Again, denial of this motion and the imposition of sanctions were both amply justified.

*Deposition.* No issue has been raised about the defendant's responses to questions posed during the four days of her deposition. These sessions apparently ended only when the plaintiff had no further questions. But the plaintiff was less pleased with the outcome of his demand that the defendant there produce 24 categories of documents. The plaintiff's subsequent motion seeking further compliance and production bore a striking and unfortunate similarity to the separate motion seeking simply the production of documents. Again, 24 identical paragraphs presented the purported "analysis" of the need for each of the 24 different categories. The statutory command that the motion include a showing of good cause was ignored. See Code of Civil Procedure section 2025.450(b)(1): "The motion shall set forth specific facts showing good cause justifying the production of any document or tangible thing described in the deposition notice." And the accompanying declaration of plaintiff's counsel was essentially a verbatim copy of the declaration presented with the motion regarding simply document production. The conclusion that these documents were "vital" was again unsupported by any specific fact. A trial judge would have no choice but to deny such a motion. The award of sanctions properly followed.

*Interrogatories.* This motion presented a substantially smaller dispute than any of the foregoing, as the defendant answered most of the questions posed to her. Only six questions were at issue. Of these, 2.1 and 14.1 were adequately answered; no relevance or discoverability was shown in regard to question 3.7; and questions 2.2, 2.6, and 2.7 so closely replicated discovery that had been barred by the family law court that the

invocation of the *Glade* rule was justified. The motion was correctly denied, with appropriate sanctions awarded.

It is worth noting that Abbot has at all times held the key to his desired discovery. Payment of the $62,500 ordered by the family law court would presumably terminate the protective order and open the door to proper discovery. In view of the facts that (1) Abbot promised Kitts $700,000 for support in their original surrogacy contract and (2) he sought more than $5 million compensatory damages, plus punitive damages, in this suit, payment of $62,500 *in obedience to a court order* seems a small step to ask of him.

B. Defendant's Motion

A final award of sanctions against Kelly arose from the granting of Kitts's motion for an order that Abbot further respond to the defendant's demand for the production of 26 categories of documents. The response to that demand contained only objections, tendered no offer to produce a single document, and was verified by Kelly. Kitts's subsequent motion featured the predictable boilerplate recitation, 26 times, that Abbot's objections were unmeritorious, including the ironic assertion that "Abbot's Boilerplate Objections are meritless." However, Kitts did go one step further and discussed each of the demands - ever so briefly - and showed their relationship to this litigation. In doing so, she made the requisite showing of good cause for the production of the requested documents. Abbot's opposition to this motion made no specific reference to any of the demands. Instead, in a four-page unverified argument, Kelly simply bemoaned the perceived misdeeds of the defendant and stated that his client was not cooperating with him. Kitts's motion was granted and sanctions of $3,500 assessed against Abbot and Kelly, jointly and severally.

Kelly's principal contention on this appeal is that he should not be sanctioned for derelictions that were beyond his control. Unfortunately, Kelly never presented proper evidence to support this argument. Neither his response to the demands, nor his opposition to this motion, nor the record for this appeal contains any sworn statement attesting to Abbot's lack of cooperation. Instead, Kelly personally served frivolous responses, never answered the meet and confer letter from defendant's counsel, and filed a skimpy opposition suggesting irrelevant reasons why the motion should not be granted (Example: "Defendant admits to wrongful retention and possession of Plaintiff's Mercedes Automobile"). Under these circumstances, the trial court could reasonably conclude that plaintiff's counsel advised and encouraged the misconduct in question. There is no contrary evidence. (See *Ghanooni v. Super Shuttle* (1993) 20 Cal. App.4th 256, 261.) This award of sanctions is affirmed.

**MOTION TO STRIKE**

While the matter was pending in this court, the respondent filed a motion seeking to strike a portion of the appellant's reply brief upon the basis that it raised a new issue regarding the timeliness of the plaintiff's effort to meet and confer. The respondent has muddled this issue. The challenged portion of the reply brief addressed the *timing* of the appellant's meet and confer letter, but the respondent's motion perceives that the issue is "Kelly's (undisputed) *failure to respond"* to respondent's letter. These are different questions. Furthermore, the appellant addressed the *timing* of the appellant's efforts in footnote eight of her respondent's brief, so this was hardly a new issue when it was discussed in the reply brief.

Respondent also objects to the reply brief's reference to the deteriorating attorney–client relationship between Kelly and his client. However, she acknowledges that this issue was raised in the opening brief. The distinction she may be trying to make here escapes the grasp of this court.

This motion to strike is denied. The points raised seem to lack merit, and they certainly have no impact upon the important dispositive issues in this appeal.

**FRIVOLOUS APPEAL**

Respondent has requested an award of fees and costs and the imposition of sanctions for the filing of a frivolous appeal. This request has merit. Another brief review of the genesis of this appeal and of its subsequent course is in order.

- The discovery initiated by Kelly was badly amiss. As suggested above, some of the subjects are puzzling, at best, and the record contains no plausible explanation for the breadth or topic of many of these demands.
- The appellant's motions in the trial court then fell well short of the mark. They were unmeritorious on several levels. Monetary sanctions for these errors were properly imposed by the trial court, and further penalties therefore will not be considered here. The purpose of this brief summary of the events prior to the appeal is simply to emphasize that there was no reasonable grievance to bring to this court.
- Kelly's opening brief here presents a mystifying array of non-issues and serious errors. He rails about the allegedly improper imposition of a terminating sanction, when nothing of the sort happened. He cites to the Federal Rules of Civil Procedure with no apparent reason. He quotes federal cases that have nothing to do with the California Civil Discovery Act. He warps the facts of this litigation beyond the limits of reasonable argument. He decries the application of "local, local rules" when, again, this did not occur. His Appellant's Appendix omitted documents necessary for a complete analysis of this appeal.
- A justification for this tour de farce advanced by the appellant at oral argument was the fear of a malpractice suit by Kelly's client if this

> discovery were not pursued to the bitter end. There are at least two problems with this view. First, Kelly's claim that he had no contact with his client when this discovery was initiated and these motions pursued - and he therefore, presumably, could not obtain consent to abandon this folly - is not supported by the record. Second, an attorney is never justified in taking such wholly unmeritorious positions before the court, even if requested to do so by a client. It is the attorney, not the client, who is the professional occupying a trusted position as an officer of the court. He must resist the misguided or improper urgings of his vengeful, angry, or merely ignorant client.

Code of Civil Procedure section 907 provides that "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." The Supreme Court has amplified the meaning of a frivolous appeal, defining it as one that "indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit." *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650. Kelly's efforts here meet that "standard."

Kitts' counsel has accompanied his motion with sufficient facts to enable this court to establish a fair level of compensation for the effort and expenses caused by this frivolous appeal. His billing rate is reasonable for an attorney of his education and experience, and the time he reports devoting to this task is fair. The court will slightly reduce that time simply to reflect the fact that counsel did not have to deal with any opposition to his motion for sanctions. The sum of $23,343.75 will therefore be added to the costs recoverable by the respondent in this matter, representing a fair and reasonable assessment for the appellant's filing and pursuit of a frivolous appeal.

## DISPOSITION

The orders of the trial court are affirmed. Respondent shall collect her costs incurred in this appeal.

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BAUER., J.*

We concur:

RUBIN, Acting P. J.

BIGELOW, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.